

7/10/2012

Amended Accusations

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Administrative Procedures Act (APA): In brief

- ▶ The APA (Gov. Code §11370, *et seq.*) provides for the following:
 - A simpler and expeditious administrative hearing process.
 - Due process rights for Respondents (licensees) in the administrative process.
 - Regulation of the conduct of formal administrative hearings by Administrative Law Judges (ALJs) and parties to the matters.
 - Procedures by which the Board conducts its adjudicative proceedings.

APA: Respondents' Bill of Rights

The APA includes the following due process rights:

- Notice and Opportunity to be heard.
- Discovery rights to all non-privileged documents in Board's investigative files.
- Opportunity to present and rebut evidence.
- Adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency.
- Written decisions based on the administrative record at hearing, and including a statement of the factual and legal basis of the decision.

APA: Administrative Adjudication

- ▶ Government Code section 11500 et seq. sets forth provisions for the formal administrative hearing process utilized by the Board.
- ▶ Hearings to determine whether a license should be revoked, suspended, or conditioned are always initiated by the filing of an Accusation, which is subject to its own requirements.

APA: Accusation Definition

Government Code section 11503 defines Accusations as follows:

- ▶ An Accusation is a written statement of charges which set forth the acts or omissions with which the Respondent is charged, to the end that the Respondent will be able to prepare a defense.
- ▶ An Accusation shall specify the statutes and rules which the Respondent is alleged to have violated.

Government Code section 11507: Amended Accusation Elements

Timing : Amended Accusation may be filed at any time before the submission of the matter for Decision.

Notice and service of Amended Accusation is required

Trial Continuance: Where Amended Accusation presents new charges, Respondent must be afforded a reasonable opportunity to prepare a defense. Hearings may be postponed for good cause.

New Charges: Deemed to be controverted.

Objections to Amended Accusation: Included in record.

Amended Accusations: Timing

Pre-Hearing

In practice, amendments to accusations are made and served at any time during the course of the case as soon as new investigations are completed and accepted for prosecution.

Once the Pre-Hearing Conference is held 6 weeks prior to hearing, ALJs control whether and when an Accusation may be amended, filed, and served by setting deadlines.

Amended Accusations: Timing

During Hearing

Rarely, amendments to accusations regarding new charges occur during the hearing.

This is usually the result of new evidence --not disclosed in prehearing discovery due to any number of valid reasons-- being admitted at hearing.

Amended Accusations: Statistics

Fiscal Year 2009/2010

Out of 190 Accusations filed, 29 later resulted in a First Amended Accusation being filed (15.2%). To date, of those 29 cases, 6 resulted in the filing of a Second Amended Accusation, and 1 resulted in the filing of a Third Amended Accusation. 8 of the 29 amended cases are still pending.

Reasons for these amendments include:

- ❖ 10 cases were amended well in advance of hearing date to add completed vertical enforcement investigations to an existing Accusation.
- ❖ 3 cases were amended after the first day of hearing to add causes for discipline following cross-examination of a Board witness, Respondent or Respondent's witness.

Amended Accusations: Statistics

Fiscal Year 2010/2011

Out of 226 Accusations filed, 25 later resulted in a First Amended Accusation being filed (11%). To date, of those 25 cases, 2 have resulted in the filing of a Second Amended Accusation, and none have resulted in Third Amended Accusations. 11 of the 25 amended cases are still pending.

Reasons for these amendments include:

- ❖ 11 cases were amended well in advance of hearing date to add completed vertical enforcement investigations to an existing Accusation.
- ❖ 1 case was amended to address an issue required for the execution of a Stipulated Surrender.
- ❖ 1 case was amended after the first day of hearing to conform the pleading to the testimony of a Board expert witness.

Conforming to Proof: Example 1

Accusations are amended to conform to proof before the submission of the case (hearing completion) when the cumulative admitted evidence, presented by the Board and Respondent via live testimony of witnesses and/or other evidence, no longer supports a viable cause for discipline in the existing Accusation.

Accusation is amended to strike out causes for discipline that no longer meet the Board's burden to prove a disciplinable violation with "clear and convincing evidence to a reasonable certainty."

(Ettinger v. Bd. of Medical Quality Assurance (1982) 135 Cal. App. 3d 853.)

Conforming to Proof: Example 2

Accusations are amended to conform to proof before the submission of the case (hearing completion) when the cumulative admitted evidence, presented by the Board and Respondent via live testimony of witnesses and/or other evidence, supports an additional cause for discipline to be added to the existing Accusation. The filing of new charges support the granting of a hearing continuance.

Accusation is amended to include causes for discipline that meet the Board's burden to prove a disciplinable violation with "clear and convincing evidence to a reasonable certainty." *(Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal. App. 3d 853.)*

Effects of Additions of Causes for Discipline for New Charges

- ▶ Continuances Requested/Granted: Requests for Continuance of Hearing filed by either the Board, the Respondent or both are made and granted, thereby, bifurcating the hearing.
- ▶ Time to Defend: Continuances allow Respondents to adequately defend against the new causes for discipline.
- ▶ Settlement Options: Stipulated settlement or surrender may be obtained in the interim.
- ▶ Avoids Additional Accusations: All issues are sought to be resolved in one Accusation via amendment, rather than filing of a separate Accusation against Respondent. This prevents the delay of the resolution of the case.

Reasons Why Amendments at Hearing May Occur

- ▶ Government Code section 11507.6 sets forth the exclusive method of discovery.
 - APA does not allow for the taking of depositions or other forms of discovery, such as interrogatories.
 - As a result, some evidence might not be disclosed until the hearing.
 - In keeping with its intent for simpler and more expeditious administrative resolutions, discovery obligations are limited under the APA.

Reasons Why Amendments at Hearing May Occur

- ▶ Experts: Board produces the written expert reports obtained in every case to Respondents in discovery. Typically, Respondents do not obtain defense expert opinion reports, and they are not required to obtain them.
- ▶ Expert Designations: Board relies on Business and Professions Code section 2334 for expert designation information regarding defense experts. A brief and concise statement about defense expert testimony is required. However, hearing testimony is much more detailed, and sometimes reveals new issues in the case.

Reasons Why Amendments at Hearing May Occur

- ▶ Evidence Admission: ALJs may allow admission of newly acquired evidence at hearing on showing of good cause. New evidence may affect pending Accusation.
- ▶ Respondent Testimony: Respondent's hearing testimony, including on cross-examination, may bring new issues to light not previously known in the investigatory phase of the case.
- ▶ Expert Testimony: Testimony of Board and defense experts, including on cross-examination, may support new charges not previously known in the investigatory phase of the case.

Conclusions

- ▶ Due process permits continuances to allow Respondents to adequately defend against new charges.
- ▶ Amendments to Accusations prevent the filing of multiple Accusations and multiple hearings against Respondent, allowing for more efficient resolution of matters.
- ▶ Amendments to Accusations pare down or add charges where justice requires it.